Supreme Court, U.S.
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No. 01-____

IN THE
Supreme Court of the United States

RANDALL C. SCARBOROUGH,

Petitioner,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 13, 2002

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QUESTION PRESENTED

In this case, the United States Court of Appeals for the Federal Circuit held that an attorney's fee application under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), is jurisdictionally barred if the fee applicant does not allege, within the statute's 30-day limitations period, that the position of the United States lacked substantial justification, even when the application itself is timely filed and the applicant promptly amends the application to supply the allegation. The Federal Circuit acknowledged that its holding directly conflicts with decisions of other circuits. The question presented is:

> Whether, or in what circumstances, an applicant for attorney's fees under the Equal Access to Justice Act is barred from obtaining a fee award by the Act's 30-day statute of limitations solely because the applicant's timely-filed fee application did not initially allege that the position of the government in the underlying litigation lacked substantial justification.

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Petitioner Randall C. Scarborough respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit affirming the dismissal of petitioner's application for attorney's fees is reported at 273 F.3d 1087 (Fed. Cir. 2001), and is reproduced in the appendix at 1a. The opinion of the United States Court of Appeals for Veterans Claims dismissing petitioner's fee application is reported at 13 Vet. App. 530 (Vet. App. 2000), and is reproduced in the appendix at 11a. The decision of the United States Court of Appeals for the Federal Circuit denying panel rehearing and rehearing en banc is not reported and is reproduced in the appendix at 15a. The decision of the United States Court of Appeals for Veterans Claims in favor of petitioner on the merits of his disability claim is not reported and is reproduced in the appendix at 17a.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit affirming the dismissal of petitioner's fee application was entered on December 10, 2001. Pet. App. 1a. Petitioner filed a timely petition for rehearing en banc on January 24, 2002, which the Federal Circuit treated as a petition for panel rehearing and for rehearing en banc and denied on February 25, 2002. Pet. App. 15a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Equal Access to Justice Act, 28 U.S.C. § 2412(d), provides in relevant part:

(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

STATEMENT OF THE CASE

In direct conflict with decisions of the Third, Sixth, and Eleventh Circuits, the United States of Appeals for the Federal Circuit below held that an application for attorney's fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), is jurisdictionally barred if the application does not, within EAJA's 30-day statute of limitations, allege that the government's position on the merits in the underlying litigation lacked substantial justification. The Federal Circuit came to that conclusion despite this Court's holding in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), that statutes of limitations running in favor of the federal government presumptively are not jurisdictional, but rather are subject to equitable principles such as tolling, waiver, and estoppel. As shown below, this Court should grant review to resolve the conflict in the circuits on the question presented and to correct the Federal Circuit's construction of EAJA, which is at odds both with *Irwin* and the statutory text.

A. The Underlying Litigation Giving Rise To Petitioner's Fee Claim.

Petitioner Randall C. Scarborough served in the United States Navy from 1972 to 1975, when he was discharged because of chronic renal failure. CAVC Record at 56. In 1993, petitioner applied for and was granted disability benefits from the Department of Veterans Affairs ("VA"). The VA agreed with petitioner that his renal failure was incurred during his military service and he was awarded a 100% disability rating. CAVC Record at 343. A dispute arose, however, concerning the effective date of petitioner's disability. Petitioner contended that his service-connected disability dated back to 1975, and challenged a March 1976 VA finding that petitioner's renal

disease was not service-connected. The Secretary of Veterans Affairs, the respondent in this Court, disagreed, arguing that the VA's 1976 finding was not "clear and unmistakable error," the acknowledged standard for overturning that finding.

Petitioner pursued his case to the Board of Veterans' Appeals ("BVA"), which rejected petitioner's claim of clear and unmistakable error. Petitioner appealed the BVA's decision to the United States Court of Appeals for Veterans Claims ("CAVC"), which had jurisdiction over petitioner's appeal under 38 U.S.C. § 7252(a). The CAVC's July 9, 1999, decision began by noting that petitioner's case was appropriate for decision by a single judge because it was one "of relative simplicity and the outcome [was] not reasonably debatable." Pet. App. 17a (quoting *Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (Vet. App. 1990)). The CAVC then reversed the BVA's decision on the ground that the BVA had failed to consider the legal standards governing whether the 1976 finding was infected with clear and unmistakable error and remanded the case for further determinations regarding the validity of that finding. Pet. App. 18a-19a. On remand, petitioner was awarded retroactive benefits for the period 1975 to 1993.

B. Applicable EAJA Principles.

To understand the dispute over petitioner's fee application, it is necessary briefly to review applicable EAJA principles. In general, EAJA provides that attorney's fees and expenses "shall" be awarded to eligible parties who have prevailed in litigation against the federal government, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). Individuals are eligible for fees if their net worth does not exceed $2 million.

Id. § 2412(d)(2)(B). To meet the substantial justification standard, the government bears the burden of showing that its position had a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Hundreds of EAJA applications are considered each year by the CAVC. *See* CAVC Annual Reports (http://www.vetapp.uscourts.gov/About Court/AnnualReport.asp).[1]

Of particular relevance here, EAJA provides that a party seeking fees shall submit its fee application within 30 days of "final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). "Final judgment" is defined as "a judgment that is final and not appealable...." *Id.* § 2412(d)(2)(G). The first sentence of subsection (d)(1)(B) describes the information to be included in the fee application:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.

Id. § 2412(d)(1)(B). It is undisputed that petitioner's fee application was submitted "within thirty days of final

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[1]In 2000, the year in which the CAVC dismissed petitioner's fee application, 634 EAJA applications were granted, 32 were denied, and 110 were dismissed. *See id.*

judgment" and contained all of the information called for by this sentence. *See* Fed. Cir. Jt. App. 13-19.

The next sentence of subsection (d)(1)(B) — not the sentence containing the 30-day filing period — states that "[t]he party shall also allege that the position of the United States was not substantially justified." 28 U.S.C. § 2412(d)(1)(B). Petitioner's initial fee application did not contain this allegation; however, as discussed further below, petitioner amended his application to add the allegation immediately after respondent moved to dismiss his application on the ground that it did not contain the allegation. Fed. Cir. Jt. App. 6.

C. Proceedings On Petitioner's Fee Application In The Court of Appeals for Veterans Claims.

On July 20, 1999, just 11 days after he prevailed on the merits in the CAVC, petitioner submitted an EAJA application seeking attorney's fees and expenses of $19,333.75 and served the application on counsel for respondent. Fed. Cir. Jt. App. 21-22. However, the Clerk of the CAVC did not file the application. Instead, under a notice dated July 23, 1999, the Clerk returned the application to petitioner on the ground that an EAJA application must be filed within 30 days "after the Court's judgment becomes final," and that finality does not occur until after the time for filing post-decision motions and appealing to the Federal Circuit has expired. Fed. Cir. Jt. App. 20.

On August 19, 1999, petitioner submitted a second EAJA application. At the same time petitioner submitted that fee application, he served it on counsel for respondent. Under then-applicable CAVC Rule 39(c), respondent was required to

serve and file his response to the application within 30 days of service of the fee application upon him, but respondent failed to do so. Meanwhile, petitioner's fee application was not immediately filed by the CAVC Clerk. Rather, the Clerk once again deemed the application "premature" on the ground that the CAVC's mandate had not yet issued in the underlying litigation and therefore, according to the Clerk, there was still no "final judgment" in the action. Pet. App. 12a. On October 4, 1999, after issuance of the mandate, the CAVC Clerk filed petitioner's fee application. Fed. Cir. Jt. App. 12.[2]

After the application was filed, respondent obtained an extension of time to answer the fee application (to which petitioner had consented) to December 3, 1999. *See* Fed. Cir. Jt. App. 3. On that date, respondent moved to dismiss the fee application for lack of subject matter jurisdiction. Respondent argued that, although the fee application was timely filed, petitioner had not made an allegation that respondent's position lacked substantial justification within the now-expired 30-day period. Respondent relied on the text of EAJA, which it claimed required the no-substantial-justification allegation to be made within the 30-day period, and on *Bazalo v. West*, 150 F.3d 1380, 1381, 1383 (Fed. Cir. 1998), which held that the 30-day period is "jurisdictional."

Immediately after receiving respondent's motion to

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[2]The CAVC apparently views EAJA's 30-day limitations period as fixing not only the *last day* on which a fee application *must* be filed but also the *first day* on which a fee application *may* be filed. *But see Shalala v. Schaefer*, 509 U.S. 292, 303 (1993) (holding EAJA fee application timely even where no final judgment was ever entered).

dismiss, petitioner filed an amendment to his fee application alleging that "[t]he government's position that the Appellant had not shown clear and unmistakable error in the 1976 [VA] decision was not substantially justified." Fed. Cir. Jt. App. 6 (Dec. 9, 1999). At the same time, petitioner opposed the motion to dismiss, arguing that his earlier omission of the no-substantial-justification allegation was not a jurisdictional defect. Petitioner also relied on *Bazalo*, which, although stating that EAJA's limitation period is jurisdictional, held that a fee applicant's failure to make a net-worth eligibility allegation within the 30-day period was not a jurisdictional bar if the fee applicant had alleged that he was the prevailing party — which, the court held, "subsume[s]" the net worth issue — and the government is not prejudiced by the omission. *See Bazalo*, 150 F.3d at 1382, 1383-84. Petitioner also urged that the limitations period be tolled, and that the government be estopped from enforcing it, because respondent himself had delayed the case by seeking an extension to file his response to the application (and obtaining petitioner's consent to that extension) and had never sought information from petitioner on the substantial justification question despite having been served with the application months earlier.

On June 14, 2000, the CAVC dismissed petitioner's fee application on the grounds urged by respondent. Pet. App. 11a-14a.

D. Proceedings and Decision in the Federal Circuit.

Petitioner appealed to the Federal Circuit. He contended that EAJA requires only that the application itself, not the no-substantial-justification allegation, be made within the 30-day period. He also argued that respondent was estopped from relying on that deadline because respondent had a lengthy

opportunity to bring the alleged defect to petitioner's attention if he truly desired the missing information or wanted to avoid delay. In this regard, petitioner pointed to CAVC Rule 39(c), which required respondent to respond to the fee application within 30 days of service of the application and which, if complied with, would have brought the omission to petitioner's attention well before the 30-day period expired.[3]

Petitioner also relied on this Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), which held

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[3]As petitioner put it below:

> Clearly government's counsel saw the defect in the application and knew that if the government responded within the 30 day requirement of Rule 39, the Veteran would have amended the application to comply with 28 U.S.C. §2412. Rather than show its cards to the Veteran, the government decided to wait until 30 days had passed the final judgment date when it would [in respondent's view] be too late for the Veteran to make a timely supplement to the application.

Brief for Appellant, at 10, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Sept. 29, 2000). Respondent did not deny that it knew of the alleged defect and deliberately waited for the 30-day period to pass, but maintained that "the timing of the Government's filing does not relieve an applicant of the jurisdictional burden to submit a complete and timely EAJA application." Brief for Respondent-Appellee, at 7 n.4, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Jan. 9, 2001).

that, absent statutory language to the contrary, limitations periods for claims against the federal government, like those involving private defendants, are not jurisdictional bars, but rather are subject to ordinary equitable principles, such as tolling and estoppel. Finally, petitioner argued that his amendment to the fee application should have been accepted because the burden of showing substantial justification is on the government. EAJA, petitioner noted, mandates an award of fees to a prevailing party "unless" the court finds that the government's position is substantially justified, 28 U.S.C. § 2412(d)(1)(A), and thus EAJA requires the government to carry the burden on the substantial justification issue whenever it wishes to avoid payment of fees to a prevailing party.

The Federal Circuit affirmed. The court first stated its understanding of 28 U.S.C. § 2412(d)(1)(B). That section, the court said, specifies that a fee applicant shall, within 30 days of final judgment, submit an application stating (1) that the applicant is a prevailing party, (2) that the applicant is eligible to receive fees (the net-worth allegation), (3) the amount sought, including an itemization, and (4) that the position of the United States was not substantially justified. Pet. App. 4a; *see also* Pet. 5a ("The same mandatory language ('shall') is used with respect to the thirty-day time limit as with the other four requirements..."). The court started from the premise that "the thirty-day time limit for submitting a fee application under the EAJA [is] jurisdictional in nature" (Pet. App. 5a), and then posed what it viewed as the question before it: "whether the other four requirements enumerated in the EAJA statute are likewise jurisdictional." *Id.* It answered that question "yes," holding that EAJA's "plain language" requires not only that an application be filed within 30 days of final judgment, but that the application contain averments about all four topics mentioned in section 2412(d)(1)(B), including a lack of

substantial justification. Pet. App. 8a. The court acknowledged a direct conflict with decisions of the Third and Eleventh Circuits, which held that a timely-filed EAJA fee application may be supplemented to supply information on those four topics absent prejudice to the government. *See* Pet. App. 5a-7a. The court relied on its prior decision in *Bazalo*. Although "this court gave Bazalo some latitude to supplement his application to flesh out the missing details of his net worth," Pet. App. 8a, the court observed, because petitioner's application "was entirely devoid" of the no-substantial-justification allegation, the CAVC "was without jurisdiction to consider his application." Pet. App. 10a.

Petitioner sought rehearing en banc based on the conflict that the panel decision had acknowledged with the Third and Eleventh Circuits. Petitioner also maintained that the panel's ruling was at odds with this Court's decision in *Irwin* and the Federal Circuit's prior decision in *Bazalo*. The rehearing petition was denied on February 25, 2002. Pet. App. 15a.

REASONS FOR GRANTING THE WRIT

A. THE FEDERAL CIRCUIT'S DECISION CREATES A DIVISION AMONG THE FEDERAL COURTS OF APPEALS ON AN IMPORTANT ISSUE OF FEDERAL LAW.

1. As the Federal Circuit recognized, its decision directly conflicts with decisions of the Third and Eleventh Circuits (and, as shown below, with a decision of the Sixth Circuit as well). In *Singleton v. Apfel*, 231 F.3d 853 (11th Cir. 2000), the court considered whether an EAJA fee applicant was jurisdictionally barred from recovery because she sought, after expiration of the 30-day filing period, to supplement her fee

application to supply a net-worth allegation and "to allege that the Commissioner's position in the district court was not substantially justified," *id.* at 857, *the exact question presented here*. The Eleventh Circuit acknowledged that waivers of sovereign immunity should not be extended "beyond the limits set by Congress," *id.* at 858, but noted that courts should be careful not to impose "an undue narrowing of the waiver intended by Congress." *Id.* The court distinguished section 2412(d)(1)(B)'s limitations period itself from the statute's pleading requirements, holding "that the government's interest in finality and reliance are satisfied once a timely EAJA application has been filed." *Id.* *Singleton* thus held that the statute's pleadings requirements are not jurisdictional, and remanded the case for proceedings on the merits of the applicant's fee claim. *Id.* "[N]ot unmindful" of the government's interests, however, the Eleventh Circuit also noted that courts have the power to order rapid completion of EAJA applications or to deny them entirely where delayed pleading prejudices the government. *Id.*

Singleton relied on the Third Circuit's decision in *Dunn v. United States*, 775 F.2d 99 (3d Cir. 1985), which also squarely conflicts with the decision below. In *Dunn*, the district court had dismissed, as jurisdictionally defective, a fee application that did not initially include the specific amount requested, an itemized statement of attorney time expended, or the rate at which fees were to be computed, even though the fee applicant had supplied the missing information shortly after the 30-day period had expired. *Id.* at 101-02. The Third Circuit reversed. The court explained that section 2412(d)(1)(B) contains two separate requirements — a deadline for filing and a pleading standard — and that "[t]he two requirements serve different purposes." *Id.* at 103. Although filing the fee claim within a certain time period serves the government's interest in

finality and reliance, *id.* at 103-04, "once the claim is filed, whether or not it is as complete as it should be, the interests of proof of timeliness and of finality and reliance have been satisfied." *Id.* at 104. For these reasons, *Dunn* concluded that section 2412(d)(1)(B)'s pleading requirements are not jurisdictional and that a court may, absent prejudice to the government, permit supplementation of the fee application after expiration of the 30-day filing period. *But see id.* at 105 (Adams, J., dissenting) (dissenting from holding in *Dunn* on same grounds relied on by Federal Circuit below).

Although not mentioned by the Federal Circuit, approximately seven months before the decision below, the Sixth Circuit adopted the Third Circuit's reasoning in *Dunn*. *See United States v. True*, 250 F.3d 410 (6th Cir. 2001). *True* involved a fee application under the Hyde Amendment, which authorizes an award of attorney's fees to certain defendants who prevail in criminal litigation with the United States and expressly adopts all of "the procedures and limitations (but not the burden of proof)" set forth in EAJA. *Id.* at 414 n.1 (quoting Pub. L. No. 105-119, § 617, 111 Stat. 2519 (1997)). The government argued that True's timely-filed fee application was jurisdictionally barred because it had not alleged True's net worth or provided an itemized fee statement under 28 U.S.C. § 2412(d)(1)(B). *Id.* at 418. The Sixth Circuit rejected that argument and held that the "pleading requirements" of section 2412(d)(1)(B), as opposed to its 30-day filing deadline, are not jurisdictional, and that therefore "timely but flawed applications [do] not deprive the lower court of jurisdiction" to entertain the application. *Id.* at 421.[4]

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[4]Although it did not frame the issue in terms of (continued...)

As indicated above, the Federal Circuit recognized that it was breaking with its sister circuits. It discussed both *Dunn* and *Singleton* in detail, Pet App. 5a-7a, and accurately described their holdings. Pet. App. 6a ("The [*Dunn*] court held that as long as the EAJA application was filed within the thirty-day time limit, the application may be supplemented or

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[4](...continued)
timeliness under section 2412(d)(1)(B), the Ninth Circuit's decision in *Thomas v. Peterson*, 841 F.2d 332 (9th Cir. 1988), also cannot be squared with the decision below. In that case, the court agreed with the government that the fee applicant had not adequately pled EAJA's net-worth requirements for organizational parties because the applicant did not state how many employees it had. *Id.* at 337; *see* 28 U.S.C. §§ 2412(d)(1)(B), (d)(2)(B). The Ninth Circuit did not dismiss the application, but rather remanded the case to allow the missing information to be presented to the district court, 841 F.2d at 337, a ruling that presupposes that the net-worth allegation did not have to be made within the 30-day filing period. In addition, a number of district court decisions are at odds with the Federal Circuit's ruling below and permit a fee applicant to supplement an otherwise timely fee application to provide information called for by section 2412(d)(1)(B). *See Olenhouse v. Commodity Credit Corp.*, 922 F. Supp. 489, 491 (D. Kan. 1996); *FDIC v. Addison Airport of Texas, Inc.*, 733 F. Supp. 1121, 1125 (N.D. Tex. 1990); *City of Brunswick v. United States*, 661 F. Supp. 1431, 1439 (S.D. Ga. 1987), *rev'd on other grounds*, 849 F.2d 501 (11th Cir. 1988); *contra Sierra Club, Ill. Chapter v. Brown*, 1999 WL 652047, at *2-*3 (N.D. Ill. Aug. 20, 1999); *FDIC v. Fleischer*, 1996 WL 707030, at *4 n.4 (D. Kan. Oct. 16, 1996); *United States v. Hopkins Dodge Sales, Inc.*, 707 F. Supp. 1078, 1080-81 (D. Minn. 1989).

corrected after the thirty-day period, provided that the Government was not prejudiced by the defect."); Pet. App. 6a-7a ("The 11th Circuit in *Singleton* adopted the reasoning of *Dunn* and likewise found that an EAJA application may be supplemented after the thirty-day time limit to satisfy the requirements regarding net worth and the Government's position being 'not substantially justified.'"). It then rejected those decisions on the ground that they "venture beyond the plain language of the EAJA statute ...." Pet. App. 7a. It took particular aim at *Dunn*'s dichotomy between filing and pleading, Pet. App. 6a, and held that the whole of section 2142(d)(1)(B) sets forth "jurisdictional prerequisites" that must be met within the 30-day filing period. Pet. App. 9a (citation omitted).

2. Not only is the division among the appellate courts irreconcilable, but the question presented is important and calls for this Court's immediate resolution. One of Congress's concerns in enacting EAJA was that "the cost of contesting a Government order ... [can] exceed[] the amount at stake ...[,]" H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4988, as may often be the case when disability benefits or small government contracts are at stake. If, as petitioner maintains, the Federal Circuit's decision is incorrect, Congress's goal would be undermined because petitioner would be required to forego his EAJA attorney's fees, thus significantly eroding the value of disability benefits wrongfully denied him for many years.

Unless corrected, the decisions below will have an adverse effect on veterans who have prevailed in benefits disputes with the VA. Indeed, in the brief time since the CAVC's fee decision below, a significant number of fee applications against respondent have been held jurisdictionally

barred on the basis of that decision, demonstrating the significant impact that the Federal Circuit's ruling will have unless this Court intercedes.[5]

Moreover, the fact that the decision below arises from the Federal Circuit is quite important, because, in addition to the large number of EAJA applications before the CAVC, *see supra* note 1, the Federal Circuit has appellate authority over many proceedings involving the federal government that are subject to EAJA, such as government contract cases, 28 U.S.C. § 1295(a)(10); *see* 5 U.S.C. § 504(b)(1)(C); GSA Board of Contract Appeals Rule 135 (procedure for seeking EAJA fees)

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[5]*See Smith v. Principi*, 2001 WL 1403609 (Vet App. Oct. 31, 2001) (dismissing fee application for failure to allege prevailing-party status; denying applicant's request to amend application outside of 30-day period under CAVC's decision in *Scarborough*); *Banks v. Principi*, 2000 WL 33582650 (Vet. App. Oct. 11, 2001) (dismissed for omission of no-substantial-justification allegation under *Scarborough*); *Wooten v. Principi*, 2001 WL 1079065 (Vet. App. Sept. 5, 2001); *Urquhardt v. Principi*, 2001 WL 1021060 (Vet. App. Aug. 24, 2001) (*sua sponte* dismissal for failure to include "all of the items described in *Scarborough*"); *Annania v. Principi*, 2001 WL 881641 (Vet. App. July 27, 2001) (dismissed for omission of no-substantial-justification allegation under *Scarborough*); *Clipper v. Principi*, 2001 WL 668926 (Vet. App. May 10, 2001) (same); *Lee v. Gober*, 14 Vet. App. 204 (Vet. App. 2000) (same; also rejecting equitable tolling). The CAVC had taken the same position in earlier rulings that were not appealed to the Federal Circuit. *See Graves v. Browning*, 15 Vet. App. 160 (Vet. App. 1996); *Franklin v. Brown*, 7 Vet. App. 388 (Vet. App. 1995).

(available at http://www.gsbca.gsa.gov/Rules.pdf), and matters arising from the United States Court of Federal Claims. *See* 28 U.S.C. §§ 1295(a)(3), 2412(d)(2)(F). In addition, EAJA applies to proceedings involving the government in the Federal Circuit itself, including appeals from decisions of the Merit Systems Protection Board, 28 U.S.C. § 1295(a)(9); *see Olsen v. Department of Commerce*, 735 F.2d 558 (Fed. Cir. 1984) (EAJA fees available in appeals from MSPB), agency Boards of Contract Appeals, and the CAVC.

B. THE DECISION BELOW IS AT ODDS WITH THIS COURT'S DECISION IN *IRWIN v. DEPARTMENT OF VETERANS AFFAIRS* AND THE TEXT AND STRUCTURE OF EAJA.

1. The Federal Circuit erred in conceiving of EAJA's time limit as jurisdictional. As noted earlier, in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, this Court held that 42 U.S.C. § 2000e-16(c) — which allows an employee aggrieved by final action of the Equal Employment Opportunity Commission 30 days to file a Title VII action in federal court — is not jurisdictional, but rather operates like a statute of limitations subject to equitable principles, such as tolling, waiver, and estoppel. The Court concluded, as a general matter, that once Congress has waived the government's sovereign immunity (as it has in EAJA), there is a rebuttable presumption that those equitable principles apply to the same extent as in a suit among private parties, and that, therefore, limitations periods in actions against the government are not jurisdictional unless Congress has explicitly so provided. *Id.* at 96. Moreover, *Irwin* expressly held that a statutory limitations period is not jurisdictional simply because it uses assertedly mandatory language such as "shall." Such an approach, the

Court held, "would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress." *Id.* at 95; *see, e.g., Bacon v. Sec'y of HHS*, 786 F. Supp. 434, 438 (D.N.J. 1992) (EAJA's 30-day period not jurisdictional under *Irwin*); *Golbach v. Sullivan*, 779 F. Supp. 9, 11-12 (N.D.N.Y. 1991) (same).

Irwin's discussion of equitable tolling principles illuminates the error committed by the Federal Circuit. This Court has "allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96 & n.3 (citing cases); *see also Young v. United States*, 122 S. Ct. ___, 2002 WL 331738, at *5 (U.S. Mar. 4, 2001) (reiterating *Irwin*'s tolling examples and noting that they are not exclusive). Here, *according to respondent*, petitioner "fil[ed] a defective pleading during the statutory period[.]" In other words, even assuming that omitting the no-substantial-justification allegation was a defect, it is undisputed that petitioner's otherwise complete application was filed "during the statutory period," and thus, under *Irwin*, petitioner would be entitled to have the 30-day period tolled. This tolling principle is effectively the rule adopted by the Eleventh Circuit in *Singleton* and the Third Circuit in *Dunn*: When an EAJA application is filed within the 30-day period, the application may be supplemented at a later date to meet the statute's pleading requirements, absent prejudice to the government. *See also True*, 250 F.3d at 418 n.5; *cf. Becker v. Montgomery*, 532 U.S. 757 (2001) (appellant's omission of required signature on notice of appeal is not jurisdictional defect, and signature may therefore be supplied after 30-day filing period imposed by Fed. R. App. P. 4); Fed. R. Civ. P. 15(c)(2) (an amendment to a

pleading "relates back to the date of the original pleading when ... the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading").[6]

2. Petitioner also urges tolling or estoppel on the ground that the pleading defect, if any, was induced by respondent's misconduct. As noted earlier, petitioner submitted his fee application to the CAVC and served it on respondent before the 30-day period had started to run. If respondent had complied with CAVC Rule 39(c), he would have answered the fee application within 30 days of service, which would have brought the alleged defect to petitioner's attention well before the 30-day period had expired. In the courts below, respondent

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[6]The rulings in *Singleton, Dunn*, and *True* are also consistent with the accepted doctrine that successful EAJA applicants should be awarded fees for the time incurred litigating their entitlement to fees. *See Commissioner, INS v. Jean*, 496 U.S. 154 (1990) (once court holds that fee applicant is prevailing party and rejects government's substantial-justification defense, government may not defend the plaintiff's request for "fees on fees" on the ground that its position in fee portion of the litigation was itself substantially justified). If respondent's view of section 2412(d)(1)(B) were correct, an EAJA fee applicant could never seek "fees on fees" since "the itemized statement ... stating the actual time expended" for that work under 28 U.S.C. § 2412(d)(1)(B) could not possibly be filed within the 30-day period. *Cf. Dunn*, 775 F.2d at 104 (treating fee itemization as a jurisdictional prerequisite to fee entitlement will have undesired effect of encouraging parties "to demand the highest amount ... they could dream up" before 30-day period expires).

did not deny that he knew of the omission at that time and simply waited until the 30-day period had expired. Respondent did say that the "VA was in compliance with all applicable [CAVC] rules." Brief for Respondent-Appellee, at 7 n.4, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Jan. 9, 2001). With all respect, that is not correct. On November 1, 2001, after the CAVC proceedings in this case, the CAVC amended Rule 39(c) to state that the government shall respond to an EAJA application within 30 days after the application is "filed" (not "served," as was previously the case). In comments accompanying the amendment, the CAVC explained its purpose: "Subsection (c) is amended (in light of the premature submission in some cases of EAJA applications prior to judgment becoming final), so as to start the Secretary's 30-day response time from the Court's filing of the EAJA application, *rather than upon service of an application on the Secretary, which occurs at the time when a premature application is submitted*." CAVC Misc. Order No. 8-01 (Nov. 1, 2001) (available at http://www.vetapp.uscourts.gov/misc01-08.pdf) (emphasis added). Thus, when petitioner served his application in 1999, respondent did *not* comply with then-applicable CAVC Rule 39(c), strongly suggesting that respondent deliberately ensnared petitioner in a procedural trap by waiting to respond until after the 30-day period expired.

3. Review is also justified by a flaw in the Federal Circuit's decision that illuminates the split in authority between that decision and the Eleventh Circuit's ruling in *Singleton*, which came to opposite conclusions on whether a fee application is jurisdictionally barred if it does not, within the 30-day period, allege that the government's position lacked substantial justification. The Federal Circuit erred when it said that the 30-day filing period applies to all four pleading requirements contained in 28 U.S.C. § 2412(d)(1)(B). S*ee* Pet.

App. 4a, 5a. That is *not* what the statute says. The first sentence of section 2412(d)(1)(B), which contains the 30-day filing deadline, says that the "application" shall contain statements concerning prevailing-party status, the applicant's eligibility (net worth), and the amount of fees sought. The next sentence — which does not include any reference to the 30-day period or to the "application" — says that the "party shall also allege that the position of the United States was not substantially justified." *See* 28 U.S.C. § 2412(d)(1)(B). Congress could have easily included the provision concerning the no-substantial-justification allegation in the prior sentence, linking it with the 30-day filing period, but it chose not to do so. Put the other way around, by including the 30-day period in the first sentence, but not in the second, it is proper to assume that the omission from the latter sentence was intentional. This textual reading — a variant on the canon *expressio unius est exclusio alterius*, *see, e.g., Swierkiewicz v. Sorema, N.A.*, 122 S. Ct. __, 2002 WL 261807, at *4 (U.S. Feb. 26, 2002) — strongly suggests that an EAJA fee applicant need only make the no-substantial-justification allegation at some reasonable point in an otherwise timely fee proceeding.

4. One further point underscores the Federal Circuit's error. As noted above (at 5, 10), EAJA places the burden of demonstrating substantial justification on the government (not on the fee applicant to demonstrate a lack of substantial justification). *See* 28 U.S.C. § 2412(d)(1)(A) (fees "shall" be awarded to the prevailing party, "unless" the court finds the position of the government was substantially justified). Thus, the government must carry that burden to avoid payment of fees to a prevailing party. *See, e.g., True*, 250 F.3d at 419 n.7 ("Under the EAJA, a prevailing party must allege the government's position was 'not substantially justified.' ... However, under the EAJA it is the government's burden to

prove that its position was substantially justified.") (citing cases); *see also* H.R. Rep. No. 120, Pt. I, 99th Cong., 1st Sess. 11, 13 (1985), *reprinted in* 1985 U.S.C.C.A.N. 140, 141; H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 10-11, 16, 18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4989, 4995, 4997. In light of that fact, it is unlikely that Congress would, in 28 U.S.C. § 2412(d)(1)(B), have imposed the strict jurisdictional bar that the Federal Circuit erected here, a bar that has produced serious harm to otherwise eligible fee applicants without any countervailing benefit.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 13, 2002

United States Court of Appeals
for the Federal Circuit

00-7172

RANDALL C. SCARBOROUGH,
Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
Secretary of Veterans Affairs,
Respondent-Appellee.

DECIDED: December 10, 2001

Before MAYER, Chief Judge, RADER, and LINN, Circuit Judges.

LINN, Circuit Judge.

Randall C. Scarborough appeals from a dismissal by the United States Court of Appeals for Veterans Claims ("Court of Veterans Claims") for lack of subject matter jurisdiction over his application for attorney fees and expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (1994). We hold that an application for attorney fees and expenses that does not include, prior to expiration of the thirty-day deadline, an allegation that the position of the United States was "not substantially justified" fails to meet the jurisdictional prerequisites of the EAJA statute. Because Scarborough's

initial application failed to comply with the statute, and the Court of Veterans Claims correctly determined that it was without jurisdiction to consider his application, this court affirms.

BACKGROUND

Upon prevailing in the underlying litigation, Scarborough submitted prematurely (before the entry of the mandate in his case) an application for attorney fees and expenses under the EAJA, 28 U.S.C. § 2412(d). On October 4, 1999, following the issuance of the mandate, the clerk filed Scarborough's EAJA application which stated that: (1) he was the prevailing party pursuant to the July 1999 remand order; (2) his net worth did not exceed the $2,000,000.00 limit for filing under the EAJA; (3) his attorney had represented him in the matter since August 1998; and (4) the attorney had incurred fees and expenses during his representation of the appellant, which were enumerated in an attachment to the application. On December 3, 1999, the Government filed a motion to dismiss the EAJA application for lack of subject matter jurisdiction. The Government argued that Scarborough had failed to satisfy the jurisdictional requirements under the EAJA statute because he did not allege in his EAJA application that the Governments position in the underlying litigation lacked substantial justification. Scarborough filed an amendment to his EAJA application on December 9, 1999. In that amendment he alleged that the Government's position lacked substantial justification.

The Court of Veterans Claims examined the EAJA statute and held that it contains several jurisdictional requirements that must be met within the thirty-day filing period, including the requirement that the applicant allege that

the Government's position is "not substantially justified." See 28 U.S.C. § 2412(d)(1)(B) (1994).

The Court of Veterans Claims then dismissed Scarborough's EAJA application for lack of subject matter jurisdiction because it found that Scarborough did not allege, within the thirty-day filing period, that the Governments position was not substantially justified. Id. Scarborough timely appealed to this court, and we have jurisdiction over the appeal pursuant to 38 U.S.C. § 7292(c).

DISCUSSION

A. Standard of Review

In reviewing decisions of the Court of Veterans Claims, this court "shall decide all relevant questions of law, including interpreting . . . statutory provisions." 38 U.S.C. § 7292(d)(1) (Supp. V 1999). This court reviews an interpretation of statutory provisions by the Court of Veterans Claims without deference. Jones v. Brown, 41 F.3d 634, 637 (Fed. Cir. 1994).

B. Analysis

"The EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity." Ardestani v. INS, 502 U.S. 129, 137 (1991). Such a waiver "must be strictly construed in favor of the United States," id., and "not enlarged beyond what the language requires." United States v. Nordic Vill., 503 U.S. 30, 34 (1992). Once the government provides the waiver, "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S. 584, 586 (1941).

In this case, the terms of the waiver are contained in the EAJA statute. That statute specifies that an applicant for an award of fees "shall," within thirty days of final judgment in the action, submit an application:

(1) showing that the applicant is a "prevailing party;"

(2) showing that the applicant "is eligible to receive an award;"

(3) showing "the amount sought," together with an itemization in support thereof; and

(4) alleging that the position of the United States "was not substantially justified."

28 U.S.C. § 2412(d)(1)(B) (1994); Singleton v. Apfel, 231 F.3d 853, 857 (11th Cir. 2000). The specific provision of the EAJA at the heart of this case states that,

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses . . . . The party shall also allege that the position of the United States was not substantially justified.

28 U.S.C. § 2412(d)(1)(B) (1994) (emphasis added).

In construing a statute, "the starting point in every case involving construction of a statute is the language itself." Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 472 (1977). We first examine the language to determine the plain meaning of the words used by Congress. Bazalo v. West, 150 F.3d 1380, 1382 (Fed. Cir. 1998). In the absence of a clearly expressed legislative intention to the contrary, the statutory language must

ordinarily be regarded as conclusive. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). "If the statute is clear and unambiguous, that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress." Sullivan v. Stroop, 496 U.S. 478, 482 (1990).

The language of the EAJA statute is plain and unambiguous for the purposes of this appeal. A party seeking an award of fees "shall" submit an application including each of the four requirements enumerated, within the thirty-day time limit. 28 U.S.C. § 2412 (d)(1)(B) (1994). The same mandatory language ("shall") is used with respect to the thirty-day time limit as with the other four requirements, and all four are stated as parts of the necessary application.

This court and five other U.S. Courts of Appeals have characterized the thirty-day time limit for submitting a fee application under the EAJA as jurisdictional in nature. See Bazalo, 150 F.3d at 1383; J.M.T. Mach Co. v. United States, 826 F.2d 1042, 1047 (Fed. Cir. 1987). See also Yang v. Shalala, 22 F.3d 213, 215 n.4 (9th Cir. 1994); Newsome v. Shalala, 8 F.3d 775, 777 (11th Cir. 1993); Damato v. Sullivan, 945 F.2d 982, 986 (7th Cir. 1991); Welter v. Sullivan, 941 F.2d 674, 675 (8th Cir. 1991); Peters v. Sec'y of HHS, 934 F.2d 693, 694 (6th Cir. 1991).

The issue in this appeal is whether the other four requirements enumerated in the EAJA statute are likewise jurisdictional. This issue was addressed in a number of cases decided by other Courts of Appeals and by this court in Bazalo. The Third Circuit in Dunn found that a failure to itemize the amount sought under the EAJA may be corrected after the thirty-day time limit if no prejudice to the Government arises.

Dunn v. United States, 775 F.2d 99, 103 (3d Cir. 1985). In a class action suit against several federal agencies involving radiation contamination by a uranium processing site, Dunn and the other named plaintiffs submitted an EAJA application that made the proper allegations that plaintiffs were prevailing parties and were eligible to receive a fee award, and that the position of the United States was not substantially justified. Id. at 100-01. However, the application failed to state the amount sought or to include an itemized statement of the actual time expended and the rate at which the expenses were computed. Id. at 101. The court held that as long as the EAJA application was filed within the thirty-day time limit, the application may be supplemented or corrected after the thirty-day period, provided that the Government was not prejudiced by the defect. Id. at 104.

The majority opinion in Dunn in effect cleaved § 2412(d)(1)(B) into two distinct components: a filing deadline and a standard for pleading:

> Requiring the filing of a fee claim (or any other) with the court . . . serves the purpose of establishing a means certain for proving compliance with a time bar. Such certainty is required in most situations in the interest of finality and reliance. But once the claim is filed, whether or not it is as complete as it should be, the interests of proof of timeliness and of finality and reliance have been satisfied. What remains is the fleshing out of the details . . .

Dunn, 775 F.2d at 103-04.

The 11th Circuit in Singleton adopted the reasoning of Dunn and likewise found that an EAJA application may be

supplemented after the thirty-day time limit to satisfy the requirements regarding net worth and the Government's position being "not substantially justified." Singleton, 231 F.3d at 858. The class action plaintiffs in Singleton challenged a policy of the Social Security Administration ("SSA") involving payment of retroactive disability benefits in "random" fashion, resulting in the loss of Medicaid benefits for plaintiffs in certain states. Id. at 854. After the SSA reversed its policy and the court remanded for a determination of retroactive benefits due, the plaintiffs filed an application under the EAJA which arguably failed to allege that the plaintiffs met the net worth requirement and that the United States position in the district court was not substantially justified. Id. at 855, 857. The court found that a timely EAJA fee application may be supplemented to meet the requirements of § 2412(d)(1)(B), but that district courts may "order rapid completion of the application or outright deny a request to supplement if the government would be prejudiced." Id. at 858. The court in Singleton stated:

> While it appears clear from the legislative history that Congress intended the filing requirement to be jurisdictional, it is far from apparent that Congress intended that "strict compliance with the pleading requirement[s] must be accomplished within the same time as filing."

Singleton, 231 F.3d at 858 (quoting Dunn, 775 F.2d at 103).

Both Singleton and Dunn venture beyond the plain language of the EAJA statute to consider underlying interests in finality and reliance as well as the legislative history. See Singleton, 231 F.3d at 858; Dunn, 775 F.2d at 103-04. However persuasive these secondary tools might be, they cannot justify disregarding the plain language of the statute.

The plain language of the EAJA statute requires that an application not only be filed by the thirty-day deadline, but that the application contain averments addressing each of the four other requirements enumerated in the statute. 28 U.S.C. § 2412(d)(1)(B) (1994). Use in the statute of the same mandatory language with respect to the thirty-day deadline and each of the four enumerated application requirements indicates that all of the requirements must be addressed, if not satisfied, within thirty days in order for a court to assert jurisdiction. While the statute requires that the application address each of the requirements of the EAJA within the thirty-day period, the statutory language does not mandate strict compliance or foreclose supplementation where the details of the stated jurisdictional averments remain to be fleshed out or corrected. When the application completely fails to address one of the four statutory requirements by the thirty-day deadline, however, more than a "fleshing out of the details" remains and the application will be jurisdictionally defective.

Our precedent in Bazalo reflects the plain language of the EAJA discussed above. In Bazalo, we held that the applicant satisfied the jurisdictional eligibility requirement by asserting he was a prevailing "party" entitled to an award in his EAJA application. 150 F.3d at 1383. Because his initial application satisfied the jurisdictional eligibility requirement, as well as all of the other jurisdictional requirements, this court gave Bazalo some latitude to supplement his application to flesh out the missing details of his net worth. Id. at 1383-84. Citing Dunn, the opinion in Bazalo stated that "[w]e agree with the Third Circuit that while the time limitation should be strictly met, the content of the EAJA application should be accorded some flexibility." Id. at 1383.

In contrast to Dunn and Singleton, this court, in Bazalo,

recognized that the EAJA statute contains "jurisdictional prerequisites" (plural). Id. at 1384 (emphasis added). We initially distinguished a "requirement" of the EAJA from a "jurisdictional prerequisite," and quoted Dunn's explication of the finality and reliance justifications for making such a distinction. Id. at 1383. However, we stopped short of adopting the holding of Dunn, instead both recognizing and analyzing as "jurisdictional requirements" and "jurisdictional prerequisites" each of the provisions of the fee application specified by the plain language of the EAJA and at the same time according fee applicants some latitude to provide details where a required averment may be less than fully explicated. Id. at 1383-84.

After enumerating the contents of Bazalo's EAJA application, including each of the four requirements of § 2412(d)(1)(B), we began our analysis by acknowledging that Bazalo had timely "met the jurisdictional requirements of the EAJA statute" and concluded by reiterating "that Bazalo's application for attorney fees and expenses met the jurisdictional prerequisites of the EAJA statute." Id. at 1383-84 (emphasis added). The requirements of the EAJA statute were recognized to include a showing that the applicant was a prevailing party, a showing that the applicant was eligible for an award, an allegation that the position of the United States was not substantially justified, and an itemized statement of the fees sought. Id. at 1383-84. The eligibility requirement, the details of which were initially lacking, was both identified as a "jurisdictional requirement" and found to have been met by Bazalo in his initial application. Id. What was left was simply a fleshing out of the details of his net worth.

In the present case, Scarborough's initial EAJA application was not merely in need of the "fleshing out of the

details" as in Bazalo, but was entirely devoid of the required allegation that the Government's position was "not substantially justified." While Scarborough sought to add the missing averment to his EAJA application in an amendment, he failed to remedy the jurisdictional defect before the expiration of the thirty-day deadline. Because Scarborough's initial application failed to comply with the statute, and his amendment was not timely in correcting the omission, the Court of Veterans Claims correctly determined that it was without jurisdiction to consider his application.

CONCLUSION

Because the Court of Veterans Claims lacked jurisdiction over Scarborough's EAJA application, we affirm.

AFFIRMED

COSTS

No costs.

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 98-1590

Randall C. Scarborough,
Appellant,

v.

Togo D. West, Jr.,
Secretary of Veterans Affairs,
Appellee.

Before KRAMER, HOLDAWAY, and GREENE, Judges.

ORDER

Before the Court is the appellant's application, through counsel, for attorney fees and expenses in the amount of $19,333.75, pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The Secretary has filed a motion to dismiss for lack of jurisdiction, and the appellant has filed a response to the Secretary's motion. For the reason that follows, the Court will dismiss the appellant's application.

In the underlying litigation, the appellant appealed a July 1998 decision of the Board of Veterans' Appeals (Board), which determined, inter alia, that a March 1976 regional office (RO) decision, which had denied entitlement to service connection for chronic renal failure on the basis that the condition preexisted service, contained no clear and unmistakable error (CUE). In a July 9, 1999, order, this Court vacated the decision and remanded the matter on the basis that

both the 1976 RO decision and the Board decision failed to address the effect of the law existing at the time of the RO decision regarding the presumption of sound condition.

The appellant, through his counsel, submitted a premature EAJA application (App.) on August 19, 1999, which was filed on October 4, 1999, after entry of mandate in this case. In his application, the appellant stated that: (1) he was the prevailing party pursuant to the July 1999 remand order, (2) his net worth did not exceed the $2,000,000.00 limit for filing under the EAJA; (3) his attorney had represented him in the matter since August 1998; and (4) the attorney had incurred fees and expenses during his representation of the appellant, which were enumerated in an attachment to the application. App. at 1-2, Attachment. On December 3, 1999, the Secretary filed a motion to dismiss for lack of jurisdiction on the basis that the appellant failed to allege that VA's position lacked substantial justification. In response, on December 9, 1999, 112 days after submission of his application and 66 days after the filing of the application, the appellant filed an amendment to his EAJA application, in which he alleged that VA's position lacked substantial justification.

The Court has jurisdiction to award reasonable attorney fees and expenses pursuant to 28 U.S.C. § 2412(d)(2)(F), as amended by section 506 of the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 506, 106 Stat. 4506, 4513 (1992). In order to be eligible for an EAJA award, the EAJA application must be filed within the 30-day EAJA application period set forth in 28 U.S.C. § 2412(d)(1)(B). In addition, in order to satisfy jurisdictional requirements, the application must contain a showing that the applicant is a prevailing party, an assertion that the applicant is a party eligible for an award under the EAJA, and an allegation that the position of the Secretary

was not substantially justified. See 28 U.S.C. § 2412(d)(1)(A) and (B); *Chesser v. West*, 11 Vet. App. 497, 499 (1998); *Bazalo v. Brown*, 9 Vet.App. 304, 308 (1996) (en banc), *rev'd on other grounds sub nom. Bazalo v. West*, 150 F.3d 1380, 1384 (Fed. Cir. 1998). Although not a jurisdictional requirement, to be a party eligible for an EAJA award, an individual must show that his or her net worth did not exceed $2,000,000.00 at the time the civil action was filed. See 28 U.S.C. § 2412(d)(2)(B); *Bazalo*, 150 F.3d at 1383-84.

Contrary to the contention of the appellant, the United States Court of Appeals for the Federal Circuit (Federal Circuit) has not held that " the requirement to file [an EAJA application] within 30 days [is] clearly jurisdictional, but the other requirements of the statute [are] not." Appellant's Response (Resp.) at 1. As indicated above, this Court specifically held in *Bazalo v. Brown* that, inter alia, the requirement that an applicant must allege, within the requisite 30-day time period, that VA's actions lacked substantial justification is jurisdictional, and that an applicant may not amend a jurisdictionally defective application outside of that 30-day filing period. See 28 U.S.C. § 2412(d)(1)(B); *Bazalo*, 9 Vet.App. at 308-09. On appeal, the Federal Circuit left intact the holding of the Court on the substantial justification question, addressing solely the question whether a timely filed EAJA application may be supplemented after the expiration of the 30-day period for filing set forth in section 2412(d)(1)(B) to show eligibility by establishing that the applicant met the net worth requirement of section 2412(d)(2)(B). *See Bazalo v. West*, 150 F.3d at 1384 (holding, where application alleged position of VA lacked substantial justification and stated that applicant was "a prevailing party and entitled to receive an award," that application could be supplemented outside 30-day filing period to show that net worth requirement met if

Government not prejudiced thereby). Indeed, the Federal Circuit implicitly upheld this Court's ruling that an allegation of substantial justification within the requisite 30-day period is jurisdictional when it stated that Mr. Bazalo, who had specifically alleged a lack of substantial justification in his original, timely, fee application, "met the jurisdictional requirements" of the EAJA statute. *Id.*; *see also Commissioner, INS v. Jean*, 496 U.S. 154, 160 (1990) (a "fee application must contain an allegation 'that the position of the United States was not substantially justified'"). Accordingly, the application filed by the appellant within the 30-day filing period, which contained no mention whatsoever regarding substantial justification, is jurisdictionally deficient. The amendment alleging a lack of substantial justification, filed well outside of the requisite 30-day period, cannot correct such a jurisdictional deficit, *see Bazalo v. Brown*, 9 Vet.App. at 308-09, and the Court therefore lacks jurisdiction over the appellant's EAJA application.

On consideration of the above, it is

ORDERED that the appellant's application for an award of attorney fees and expenses under the EAJA is DISMISSED for lack of jurisdiction.

DATED: June 14, 2000 PER CURIAM.

United States Court of Appeals
for the Federal Circuit

00-7172

RANDALL C. SCARBOROUGH,
Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
Secretary of Veterans Affairs,
Respondent-Appellee.

ORDER

A petition for rehearing en banc having been filed by the APPELLANT, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on March 4, 2002.

FOR THE COURT,

s/

Jan Horbaly,
Clerk

Dated: February 25, 2002

cc: Brian Wolfman
Joseph Trautwein

SCARBOROUGH V DVA, 00-7172
(CVA - 98-1590)

****

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

bUNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 98-1590

RANDALL C. SCARBOROUGH, APPELLANT,

V.

TODD D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before KRAMER, *Judge*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 29(i), this action may not be cited as precedent.

The appellant appeals a July 6, 1998, decision of the Board of Veterans' Appeals (Board or BVA) finding no clear and unmistakable error (CUE) in a March 25, 1976, rating decision that denied entitlement to service connection for chronic renal failure (claim 1), and denying an effective date earlier than April 21, 1993, for an award of service connection (and a 100% evaluation) for end stage renal disease (claim 2). Single-judge disposition is appropriate when, as here, the issue is of relative simplicity and the outcome is not reasonably debatable. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Because the appellant's arguments pertain only to claim 1, any appeal as to claim 2 is deemed abandoned. *See Ford v. Gober*, 10 Vet.App. 531, 535-36 (1997) (citing *Bucklinger v.*

Brown, 5 Vet.App. 435, 436 (1993)).

Under 38 C.F.R. § 3.105(a) (1997), a prior decision must be reversed or amended where evidence establishes CUE. For CUE to exist:

> (1) "[e]ither the correct facts, as they were known at the time, were not before the adjudicator (i.e., more than a simple disagreement as to how the facts were weighed or evaluated) or the statutory or regulatory provisions extant at the time were incorrectly applied," (2) the error must be "undebatable" and of the sort "which, had it not been made, would have manifestly changed the outcome at the time it was made," and (3) a determination that there was CUE must be based on the record and law that existed at the time of the prior adjudication in question.

Damrel v. Brown, 6 Vet.App. 242, 245 (1994) (quoting *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (en banc)). On appeal of a BVA determination that there was no CUE in a prior final RO decision, the Court's review is limited to determining whether the Board's conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 38 U.S.C. § 7261 (a)(3)(A), and whether the Board provided an adequate statement of reasons or bases for its denial of CUE. *See Eddy v. Brown*, 9 Vet.App. 52, 57 (1996); *Russell*, 3 Vet.App. at 315.

The Court has reviewed the record on appeal and the filings of the parties. Both the 1976 regional office (RO) decision, to the extent it determined that the appellant's chronic renal failure preexisted service, and the BVA decision, which determined that there was no CUE in such decision (as well as

the Secretary in his brief) failed to address (as raised by the appellant below (R. at 315)), the effect of the law as it existed at the time of the RO's 1976 adjudication, namely the presumption of sound condition. *See* Appellant's Reply Brief at 2. Accordingly, the Court concludes that the Board's decision is not supported by an adequate statement of reasons or bases and must be vacated. *See Eddy* and *Russell*, both *supra*. On remand, the BVA shall address such failure in the 1976 decision and its effect on the appellant's CUe claim. In doing so the BVA shall consider all the evidence of record at the time of the 1976 RO decision, not simply "an item of evidence" (R. at 12) supporting the government's position. Moreover, with respect to the latter, the BVA shall address in its determination, the significance of the lack of any signatures on the reports by the medical and physical evaluation boards. R. at 99-102, 106. Assuming that the BVA determines that any such failure is not outcome determinative, it shall then address, providing adequate reasons or bases, whether there was CUE in the 1976 RO decision insofar as it did not award service connection based upon aggravation. In this regard, the Board shall compare the appellant's disability at the time of entry into the service with his disability at discharge and provide reasons or bases as to whether, under the statutory and regulatory aggravation provisions extant at the time of the 1976 RO decision, there was an increase in disability during service, *see* Appellant's Reply Br. at 4 ("the Government... equated a temporary kidney condition, which was resolved prior to entry, to kidney failure after entry"), and if so, address under such law, the significance of the RO's failure to find that any such increase was due to the disease's natural progress.

On consideration of the foregoing, it is

ORDERED that the July 6, 1998, BVA decision is VACATED and the matter is REMANDED for further proceedings consistent with this order.

DATED: JUL -9 1999

BY THE COURT:

s/
KENNETH B. KRAMER
Judge

Supreme Court, U.S.
FILED
MAY 17 2002
THE CLERK

No. 01-1360

In the Supreme Court of the United States

RANDALL C. SCARBOROUGH, PETITIONER

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(B), provides that "[a] party seeking an award of fees * * * shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney * * * stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified."

The question is whether a complete application satisfying each of the elements of subsection 2412(d)(1(B), including an allegation that the government's position was not substantially justified, must be filed within thirty days of final judgment.

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In the Supreme Court of the United States

No. 01-1360

RANDALL C. SCARBOROUGH, PETITIONER

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 273 F.3d 1087. The decision of the United States Court of Appeals for Veterans Claims (Pet. App. 11a-14a) is reported at 13 Vet. App. 530.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2001. A petition for rehearing was denied on February 25, 2002 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on March 13, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Equal Access to Justice Act (EAJA) authorizes a court to award fees to prevailing parties in certain litigation against the United States, unless the position of the United States is found to be substantially justified:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. 2412(d)(1)(A).

As a prerequisite to obtaining fees under EAJA, a party must file an application containing cerain information within thirty days of final judgment:

> A party seeking an award of fees * * * shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney * * * stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified.

28 U.S.C. 2412(d)(1)(B).

2. Petitioner sought review of a decision made by the Board of Veterans' Appeals that found no clear and unmistakable error in a 1976 determination that petitioner's disability lacked a service connection. Pet. App. 17a. The United States Court of Appeals for Veterans Claims (CAVC) reversed and remanded the Board's decision (*id.* at 20a), and, on remand, petitioner was awarded retroactive benefits. Petitioner prematurely filed an application for attorneys fees under EAJA with the Court of Appeals for Veterans Claims, which was held and treated as filed on October 4, 1999, following the issuance of the court's mandate. See *id.* at 2a. Petitioner's application stated that petitioner "was the prevailing party pursuant to the July 1999 remand order" and that "his net worth did not exceed the $2,000,000.00 limit for filing under the EAJA." *Ibid.* The application also included an enumeration of the fees and expenses incurred by his attorney in representing him. The application did not, however, allege that the government's position in the underlying litigation lacked substantial justification. *Ibid.* On December 3, 1999, the government moved to dismiss the application for lack of subject matter jurisdiction for failure to allege a lack of substantial justification in the government's position.

3. The CAVC dismissed petitioner's application. Pet. App. 11a-14a. The court held that "to be eligible for an EAJA award, the EAJA application must be filed within the 30-day EAJA application period set forth in 28 U.S.C. 2412(d)(1)(B)" and "in order to satisfy jurisdictional requirements, the application must contain a showing that the applicant is a prevailing party, an assertion that the applicant is a party eligible for an award under the EAJA, and an allegation that the position of the Secretary was not substantially justified."

Id. at 12a-13a. Because petitioner's application contained no allegation that the government's position lacked substantial justification, the court found that it "lack[ed] jurisdiction over the * * * EAJA application." *Id.* at 14a.

4. The Federal Circuit affirmed. Pet. App. 1a-10a. The court read the language in EAJA to be "plain and unambiguous" in requiring that "[a] party seeking an award of fees 'submit' an application including each of the four requirements enumerated, within the thirty-day time limit." *Id.* at 5a. The court acknowledged that the Third Circuit had held, in *Dunn* v. *United States*, 775 F.2d 99, 104 (1985), that "as long as the EAJA application was filed within the thirty-day time limit, the application may be supplemented or corrected after the thirty-day period, provided that the Government was not prejudiced." Pet. App. 6a. Likewise, the court acknowledged that the Eleventh Circuit had reached a similar result in *Singleton* v. *Apfel*, 231 F.3d 853 (2000). Pet. App. 6a-7a. The court explained, however, that those decisions "venture[d] beyond the plain language of the EAJA." *Id.* at 7a.

The court of appeals nonetheless recognized that the "statutory language does not mandate strict compliance or foreclose supplementation where the details of the stated jurisdictional averments remain to be fleshed out or corrected." Pet. App. 8a. It is only "[w]hen the application completely fails to address one of the four statutory requirements by the thirty-day deadline" that the "application will be jurisdictionally defective." *Ibid.* The court accordingly held that it lacked jurisdiction over petitioner's application because it "was not merely in need of the 'fleshing out of the details' * * * but was entirely devoid of the required allegation that

the Government's position was 'not substantially justified.'" *Id.* at 9a-10a.

ARGUMENT

1. The Federal Circuit correctly held that the plain language of EAJA requires a timely filed application to include an allegation that the government's position in the underlying proceeding was not substantially justified. The EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States (see, *e.g.*, *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)) and not enlarged beyond what the language requires (*United States* v. *Nordic Village*, 503 U.S. 30, 34 (1992)). If the government consents to an action, "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941).

Section 2412(d)(1)(B) of EAJA provides:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement * * *. The party shall also allege that the position of the United States was not substantially justified.

Subsection 2412(d)(1)(B) thus requires an application to be filed within thirty days of final judgment and include (1) a showing that applicant is a prevailing party; (2) a showing that applicant is eligible to receive an award,

i.e., that applicant's net worth "did not exceed $2,000,000 at the time the civil action was filed," 28 U.S.C. 2412(d)(2)(B); (3) the amount sought, with an itemization of time expended; and (4) an allegation that the government's position was not substantially justified.

As the court of appeals held, the Act's "plain language * * * requires that an application not only be filed by the thirty-day deadline, but that the application contain averments addressing each of the four * * * requirements enumerated in the statute." Pet. App. 8a. The requirements—as to both timeliness and an application's required contents—are included in the same subsection and, except for the allegation of substantial justification, in the same sentence. Because the statute "[u]se[s] * * * the same mandatory language with respect to the thirty-day deadline and each of the four enumerated applications requirements * * *[,] all of the requirements must be addressed, if not satisfied, within thirty days in order for a court to assert jurisdiction." *Ibid.* Thus, the pleading requirements of Section 2412(d)(1)(B) set forth the irreducible minimum of an EAJA application that must be timely filed within the statutory period.[1]

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[1] Contrary to petitioner's suggestion (Pet. 20-21), little import should be placed on the fact that the required allegation of no substantial justification is included in the subsequent sentence rather than the sentence with the time limit and the other three application requirements that must be "show[n]" by the applicant. Instead, the use of a second sentence is best explained as an effort to preserve parallel sentence structure and make clear that an application need only "allege," as opposed to "show," a lack of substantial justification. 28 U.S.C. 2412(d)(1)(B). Petitioner repeats this error by relying (Pet. 21-22) on the fact that Section 2412(d)(1)(A) places on the government the burden of showing that the govern-

2. The court of appeals' decision is supported by the history and purpose of EAJA to prevent EAJA applications from growing into a "second major litigation." *Pierce* v. *Underwood*, 487 U.S. 552, 563 (1988). The Senate Report on the bill that became the 1985 EAJA amendments explained that the "thirty-day deadline for filing the fee application is jurisdictional and cannot be waived." S. Rep. No. 586, 98th Cong., 2d Sess. 16 (1984); see H.R. Rep. No. 120, 99th Cong., 1st Sess. 7 (1985). Congress similarly rejected a proposal that would allow time extensions to be granted.[2] Congress was clearly attuned to the potential for high costs in resolving EAJA claims.[3] Congress did not want EAJA litigation to "unduly prolong many law suits to the detriment of the parties and our system of justice." H.R. Rep. No. 1005, 96th Cong., 2d Sess. 27 (1980) (add'l

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ment's position is substantially justified. That simply underscores the need to separate lack of substantial justification, which need only be alleged, from the other factors in subsection 2412(b)(1)(B), as to which the application bears the burden of proof (*i.e.*, factors it must "show."). Regardless of the burden of *proof* on the issue, Congress unambiguously placed the burden on the applicant to make a timely *allegation* in his application that he is entitled to fees because the government's position was not substantially justified.

[2] *Reauthorization of Equal Access to Justice Act: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 15 (1983).

[3] See H.R. Rep. No. 1418, 96th Cong., 2d Sess. 22 (1980) (CBO report illustrating the costs involved in litigating EAJA claims); *Equal Access To Justice Act of 1979, S. 265: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 9 (1979) (*1979 Senate Hearings*).

views of Rep. LaFalce); see *1979 Senate Hearings* 43 (Sen. DeConcini).

Accordingly, Congress in drafting EAJA sought to "authorize * * * relief * * * in as *concise* and *precise* a fashion as possible" in order to "avoid any measure that will itself breed additional litigation." H.R. Rep. No. 1005, *supra*, at 28 (emphasis added). That interest in concision and precision reinforces the text's requirement that litigants turn square corners and make a timely filing that complies with the requirements of Section 2412(d)(1)(B). Congress envisioned a streamlined procedure to resolve fee disputes. That end would not be served by petitioner's reading of EAJA, the logic of which would permit an applicant to file an EAJA application that stated *none* of the pleading requirements of Section 2412(d)(1)(B). That approach would invite disputes over the adequacy of filings and the extent of prejudice to the government. In other words, it would invite exactly the sort of process that threatens to grow into a "second major litigation." *Pierce*, 487 U.S. at 563. Instead, by requiring a complete application to confer jurisdiction on the district court, the EAJA application provision helps ensure that the government is in a position to assess the fee petition and that fee disputes will be resolved promptly and efficiently.[4]

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[4] Petitioner argues in a footnote (Pet. 19 n.6) that an applicant should not be required to allege the amount of fees sought because that requirement might interfere with an applicant's ability to collect additional fees for applying for fees under EAJA. But that argument is in serious tension with petitioner's acknowledgment (Pet. 20-21) that the statutory requirement that the applicant show the amount of fees sought is contained within the same sentence imposing the 30-day jurisdictional filing requirement. In any event, petitioner makes no argument that an EAJA applicant

3. The court of appeals' decision also comports with this Court's recent intervening decision in *Edelman* v. *Lynchburg College*, 122 S. Ct. 1145 (2002). In *Edelman*, this Court held that a timely discrimination charge filed pursuant to Title VII, 42 U.S.C. 2000e-5(e)(1), need not include within the time period a verification of the charge that is required by a separate subsection of the statute, 42 U.S.C. 2000e-5(b). 122 S. Ct. at 1150.[5] The Court reasoned that the provision requiring verification "merely requires the verification of the charge, without saying when it must be verified." *Id.* at 1149. The time limit there, likewise, merely provides "that a charge must be filed within a given period, without indicating whether the charge must be verified when filed." *Ibid.*

There is no such textual ambiguity under EAJA, which incorporates the time limit and the required application contents in the same subsection—indeed, for the most part in the same sentence. It provides that a party seeking fees "*shall*, within thirty days * * * submit to the court an application for fees * * * *which shows that*" the party prevailed, is eligible, includes an itemization, and alleges that the government's position was not substantially justified. 28 U.S.C. 2412(d)(1)(B)

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somehow will not know 30 days following a final judgment whether the government's position was substantially justified. Thus, like requiring that an applicant aver that he is a prevailing party below, EAJA requires an application to facially state an entitlement to fees because the government's position below was not substantially justified.

[5] Section 2000e-5(b) provides that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." Section 2000e-5(e)(1) provides that "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred."

(emphasis added). Unlike the ambiguous Title VII language at issue in *Edelman*, EAJA's text unambiguously requires a timely allegation that the government's position lacked substantial justification. Indeed, the Court in *Edelman* recognized that the agency could have permissibly construed Title VII to require a plaintiff to file a verified charge within the charge-filing time limit. 122 S. Ct. at 1150 n.8; accord *id.* at 1154 (O'Connor, J., concurring in the judgment) ("the best reading of the statute is that a charge must be made under oath or affirmation within the specified time").

Morever, the Court in *Edelman* relied on the "consisten[t] * * * * background law" that allows a verification to relate back to an otherwise timely filed (albeit unverified) pleading. 122 S. Ct. at 1151. By contrast, courts, including this Court, regularly treat content requirements in a filing as necessary to confer jurisdiction. See, *e.g.*, *id.* at 1151 ("the timing and content requirements for the notice of appeal [are] 'jurisdictional in nature'"); *Becker* v. *Montgomery*, 532 U.S. 757, 765 (2001) (signature need not be included on notice of appeal, but content and timing requirements "are indeed linked jurisdictional provisions"); *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988) (failure to name a party in a notice of appeal "constitutes a failure of that party to appeal"). Accordingly, there is no background tradition consistent with allowing petitioner's incomplete EAJA application to confer jurisdiction on the district court. Rather, until *all* of the information required by Section 2412(d)(1)(B) is provided, no application has been "submitt[ed]" (*ibid.*) under the statute. See, *e.g.*, *Commissioner* v. *Jean*, 496 U.S. 154, 160 (1990) ("A fee application *must contain* an allegation 'that the position of the United States was not substantially justified.'") (emphasis added).

4. Petitioner urges (Pet. 11-17) that certiorari is warranted to resolve a conflict in the circuits on the question presented. It is not clear, however, that the court of appeals' decision will adversely affect EAJA applicants with any significant frequency or that the conflict is of great practical importance. EAJA applications will nearly always be prepared by attorneys, who will presumably follow the decision below when filing EAJA applications in the Federal Circuit. Cf. *Edelman*, 122 S. Ct. at 1150 (noting that Title VII is a "remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process."). Moreover, unlike a conflict that creates different rules governing primary conduct in different parts of the country, the conflict here only affects the conduct of attorneys preparing fee petitions in litigation against the government. It creates no material inconsistency if lawyers litigating in the Federal Circuit are on notice from a governing precedent that Section 2412(d)(1)(B) means what it says and will be taken seriously, while lawyers in the other circuits that have addressed the issue are on notice that they have greater latitude in making a EAJA filing.

The conflict in authority does not create any prejudice. The government suffers no prejudice from the rule of other circuits because those circuits excuse only filings that do not prejudice the government. Moreover, there is no prejudice to litigants in the Federal Circuit now that the rule is clearly established. Although petitioner notes (Pet. 16 n.5) instances in which litigants did not file a timely EAJA application containing the requirements of Section 2412(d)(1)(B), those decisions were decided before the Federal Circuit's decision in this case. Moreover, the decision below recognizes that, as long as an applicant timely alleges

the basic jurisdictional prerequisites under EAJA, the applicant will be permitted "some latitude to supplement his application to flesh out the missing details." Pet. App. 8a. Accordingly, because there is no reason to conclude that the decision below will lead to the inadvertent filing of defective EAJA applications, this Court's review is not warranted.

5. Certiorari review is also not warranted to consider petitioner's contention (Pet. 19-20) that the 30-day limitations period should be equitably tolled under this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). The court of appeals addressed neither that issue nor the antecedent issue of whether EAJA's pleading requirements are subject to equitable tolling.[6] This Court should accordingly decline to consider those issues in the first instance. See, *e.g.*, *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999).

Moreover, this case would not be an appropriate vehicle to consider whether equitable tolling should be unavailable under EAJA, because petitioner could not prevail under such a theory. The doctrine of equitable tolling is "extended * * * only sparingly," and does not extend to a situation, like here, where the failure to follow clear statutory requirements is "at best a garden variety claim of excusable neglect." *Irwin*, 498 U.S. at 96.[7] Petitioner argues (Pet. 19) that his pleading defect

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[6] Petitioner did not cite *Irwin* to the court of appeals until his reply brief. See Reply Br. at 4-5.

[7] Petitioner therefore errs in reading (Pet. 18) *Irwin* to make equitable tolling applicable whenever a defective pleading is filed "during the statutory period." Such an expansive reading of the doctrine of equitable tolling would swallow congressionally mandated pleading requirements by encompassing a "garden variety claim of excusable neglect." *Irwin*, 498 U.S. at 96.

"was induced by [the government's] misconduct" because the government did not file a response within 30 days of petitioner's premature application as required by petitioner's reading of the then extant Vet. App. R. 39. The government, however, did not cause petitioner to file a defective pleading; that error was caused by petitioner's counsel. See Response to Appellee's Motion to Dismiss Motion for Leave to Supplement Filing 3 ("the omission of the allegation as to substantial justification was the error of counsel").

Moreover, there is no evidence that the government's failure to file a response to petitioner's premature pleading at that time was a result of an intent to lull petitioner into not correcting a defective pleading, and indeed the CAVC issued an order that notified the government that its response was due 30 days after petitioner's application was *filed*, not 30 days after petitioner served its application on the government as suggested by petitioner. App., *infra*, 1a. In any event, petitioner cites no basis for contending that the government had an obligation to bring a pleading defect to petitioner's attention so that petitioner would have had time to correct the mistake before the expiration of the 30-day period following final judgment. In those circumstances, it would not be appropriate to extend the doctrine of equitable tolling to excuse petitioner's mistake in filing a defective EAJA application.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
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MAY 2002

APPENDIX

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 98-1590

RANDALL C. SCARBOROUGH, APPELLANT

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE

Filed: Oct. 4, 1999

ORDER

The appellant's premature application for attorney fees and expenses is filed today. It is ORDERED that the Secretary's response is due within 30 days after the date of this order.

FOR THE COURT:

ROBERT F. COMEAU
Clerk of the Court

By: ILLEGIBLE
Deputy Clerk

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Supreme Court, U.S.
FILED
MAY 24 2002
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NO. 01-1360

IN THE
Supreme Court of the United States

RANDALL C. SCARBOROUGH,

Petitioner,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. The most striking feature of the government's opposition, and its only feature that bears on whether review is appropriate, is its repeated acknowledgment of a direct conflict in circuit authority on the question presented. *See, e.g.*, Opp. 4 (explaining inconsistency of Federal Circuit's ruling with rulings of Third and Eleventh Circuits); *id.* at 11 (acknowledging "conflict in the circuits on the question presented" and contrasting the Federal Circuit's rule with "the rule in the other circuits"). The government nevertheless argues that review should be denied because the conflict "creates no material inconsistency" as lawyers "in the Federal Circuit are on notice" of its strict, albeit aberrational, rule concerning the jurisdictional prerequisites for EAJA applications. *Id.* If that were a proper basis for denying certiorari, however, this Court would never grant review in a case where it could be said that the rule imposed by the court of appeals does not affect "primary conduct," *see id.*, and that litigants need only adhere strictly to that rule no matter how technical, picayune, or at odds with Congressional intent.

But this Court consistently rejects that approach. *See, e.g., Becker v. Montgomery*, 532 U.S. 757 (2001) (entertaining question whether requirement that notice of appeal be signed is jurisdictional or subject to amendment after time to appeal has run); *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990) (entertaining question whether Title VII's limitations period must be strictly applied in all cases or is subject to exceptions); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (entertaining question whether requirement that notice of appeal name all appellants must be literally followed or "et al." designation is sufficient in some circumstances); *Foman v. Davis*, 371 U.S. 178 (1962) (entertaining question whether appellant must strictly comply with requirement that notice of appeal refer specifically to order appealed from or may court

look beyond notice to ascertain appellant's intent). In each of these cases, a court of appeals had put future litigants on notice that the relevant rule would be strictly observed without exception, yet the Court granted certiorari to determine the correct outcome and promote national uniformity on an important issue of federal law.

Quite apart from promoting uniformity, the Court should grant review for a more fundamental reason. The government's rationale for overlooking the circuit split presupposes that no important purpose is served by a rule that permits flexibility in construing a Congressional limitations period. That is not so. Doctrines that allow amended pleadings and motions to "relate back" to the original filing date, and concepts of equitable tolling, estoppel, waiver, and the like do, in fact, serve an important purpose: They recognize that both lay people and lawyers sometimes make procedural errors, and they ask whether, under the circumstances, those errors ought to be excused because the benefit of doing so outweighs the harm created by strict imposition of a time bar or other procedural rule. Thus, the government's position — that future EAJA fee applicants in the Federal Circuit can avoid a problem by strictly adhering to the 30-day time period — simply assumes the answer to the basic question whether Congress intended that the substantive goals of EAJA would be best served by a strict jurisdictional time bar or by a more flexible rule such as that adopted by the Third, Sixth, and Eleventh Circuits.[1]

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[1]Strangely, while acknowledging that the opinion below conflicts with the rulings of the Third and Eleventh Circuits, the government's opposition (like the Federal Circuit's opinion) ignores

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2. Seeing no way around the circuit split, the government's first argument and the bulk of its opposition is devoted to the proposition that the Federal Circuit's holding is correct. Opp. 5-10. That a respondent believes that the decision below is correct is not a sufficient reason to leave a split in appellate authority unresolved, especially where three circuits fundamentally disagree with respondent's position on the question presented.

a. As the Third, Sixth, and Eleventh Circuits have explained, even assuming that the 30-day filing deadline is jurisdictional and admits of no exceptions, there is no reason to believe that Congress intended that jurisdictional bar to apply to the contents of the fee application. *Dunn v. United States*, 775 F.2d 99 (3d Cir. 1985); *United States v. True*, 250 F.3d 410 (6th Cir. 2001); *Singleton v. Apfel*, 231 F.3d 853 (11th Cir. 2000). Rather, as those courts have explained, once a timely fee application is filed, EAJA's concerns with timeliness, finality, and reliance "have been satisfied[,]" *see, e.g., Dunn*, 775 F.2d at 104, and there is no basis for extending the 30-day time limit to EAJA's pleading requirements. As a result, those courts have permitted supplementation of a timely fee application, absent prejudice to the government.

b. In any event, the government is unable to deal with the fact that the statute's limitation period is contained in a separate sentence from the statute's requirement that the party allege that the position of the United States was not

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[1](...continued)
the Sixth Circuit's ruling in *United States v. True*, 250 F.3d 410 (6th Cir. 2001), which, as discussed in the petition (at 13), directly conflicts with the decision below.

substantially justified. That is a problem for the government because even if it could be said the statute's other pleading requirements must be completed within 30 days — a conclusion flatly rejected by *Dunn*, *True*, and *Singleton* — that cannot be said for the no-substantial-justification allegation. The government's only response is to speculate that Congress placed what an application must "show" in a different sentence from what a party must "allege" in "an effort to preserve parallel sentence structure." Opp. 6 n.1. Even if the government were correct that it would have been grammatically difficult to list all four pleading items in the first sentence of 28 U.S.C. § 2412(d)(1)(B), that would not explain why Congress did not also include the 30-day time period in the second sentence of that section if it wanted that sentence to bear the meaning given to it by the Federal Circuit.

In any event, use of two separate sentences was not a matter of grammatical necessity. If Congress had wanted to merge the two sentences into one, it could have done so very easily, just as the Solicitor General has done twice in its opposition. Opp. 9, 5-6; *see also* Pet. App. 4a (tabulating EAJA's four pleading requirements in one sentence). Thus, when construing the two distinct and differently-worded sentences of section 2412(d)(1)(B), courts should apply the "general[] presum[ption] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *See, e.g.*, *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) (internal quotation marks and citation omitted); *cf. Edelman v. Lynchburg College*, 122 S. Ct. 1145 (2002) (limitations period for filing Title VII charge of discrimination contained in one subsection of 42 U.S.C. § 2000e-5 does not apply to other subsection's requirement that charge be verified).

c. Even assuming that Congress contemplated that section 2412(d)(1)(B)'s pleading requirements be met within the 30-day period, that period is not a "jurisdictional" time bar, but rather a statute of limitations subject to equitable exceptions. *See* Pet. 17-19. As such, an amendment to an EAJA fee application, such as the amendment filed by petitioner just days after the government moved to dismiss his application, may "relate back" to the original filing date, *see Edelman*, 122 S. Ct. at 1151; *see also Becker v. Montgomery*, 532 U.S. 757 (2001); Fed. R. Civ. P. 15(c), and fee applicants may avoid dismissal under equitable doctrines such as tolling, estoppel, and waiver, absent prejudice to the government.

The government claims that section 2412(d)(1)(B) is jurisdictional, but ignores the governing authority, *Irwin v. Department of Veterans Affairs*, 498 U.S. at 94-96, which recognized a strong presumption that Congressionally-established filing periods for claims against the government, like those involving private defendants, are non-jurisdictional statutes of limitations, subject to equitable principles. Unable to respond to *Irwin*, the government relies solely on an assertion that the "Senate Report on the bill that became the 1985 EAJA" said that the filing period "is jurisdictional and cannot be waived." Opp. 7 (quoting S. Rep. No. 98-586 16 (1984)). Even if the government's assertion were correct, a single snippet in a committee report cannot overcome the principle of statutory construction set forth in *Irwin*, which may only be rebutted if "Congress ... provide[s] otherwise." *Irwin*, 498 U.S. at 96.

In any event, the government's assertion is incorrect. In fact,"[n]o Senate Report was submitted with th[e] legislation" that was enacted by the 99th Congress in 1985. 1985 U.S.C.C.A.N. 132. The committee report cited by the government is not legislative history at all because it was

prepared for a 1984 version of EAJA passed by the *98th Congress* and *vetoed* by the President. *See* H.R. Rep. No. 99-120 (I) 6 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 134; *cf. Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring). The inherent unreliability of the report upon which the government rests its position is made plain by the more in-depth House Report from the *99th Congress* that accompanied the bill that actually became law in 1985. That report contains the same general discussion of the statute's limitations period and cites the same authority as did the earlier 1984 report, *but it omits the language upon which the government relies.* H.R. Rep. No. 99-120 (I) 19-20 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 148. Indeed, it would have been anomalous for the 99th Congress to have made the filing deadline strictly jurisdictional because, at the same time, it urged that the deadline not be construed in an "overly technical" manner as a "trap for the unwary." *Id.* at 18 n.26; H.R. Rep. No. 99-120 (II) 6 & n.26 (1985), *reprinted in* 1985 U.S.C.C.A.N. 151, 156. In sum, there is no basis for the government's assertion that EAJA's 30-day filing period is an absolute jurisdictional bar.

d. On the question whether tolling applies here, the government relegates to a footnote (Opp. 12 n.7) its conclusory rejection of our contention that petitioner "actively pursued his judicial remedies by filing a defective pleading during the statutory period[.]" *Irwin*, 498 U.S. at 96. However, it does not dispute that this formulation is one of the time-honored bases for tolling. *See also Young v. United States*, 122 S. Ct. 1036, 1041 (2002) (reiterating that formulation). And the government does not question whether, as a factual matter, petitioner meets that standard. Even if one agrees with the government that petitioner's application was defective, there is no question that it was timely filed "during the statutory period." Indeed, petitioner twice submitted his fee application to the Court of

Appeals for Veterans Claims ("CAVC"), at a point the CAVC Clerk deemed premature, and the Clerk filed it on the *first day* of the 30-day period. Absent impropriety on petitioner's part or prejudice to the government, the period should have been tolled, even assuming that the application was otherwise time barred.

Petitioner's other claimed basis for tolling is that his purported error was induced by the government's misconduct. On that issue, we rest mainly on the petition (at 19-20), and respond to only one argument. The government relies on the CAVC's order providing the government an extension of time to file its response, *see* Opp. 13, but that extension is quite beside the point. The salient point is that, before obtaining that extension, the government had a clear duty under CAVC Rule 39 to respond to the application, and *that response* would have put petitioner on notice of the alleged defect well before the 30-day period had run (indeed, before it had begun to run). If the government had followed the rules, the application would have been heard on its merits promptly and efficiently, which is, according to the government, the overriding purpose of the 30-day filing period. *See* Opp. 8. It is simply intolerable for the government to impose a time bar on an EAJA applicant on the theory that EAJA requires "litigants to turn square corners and make a timely filing," *id.*, where the problem would have been avoided if the government itself had "turn[ed] square corners" and followed the applicable rule.[2]

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[2]The government asserts that the tolling issue and the "antecedent question of whether EAJA's pleading requirements are subject to equitable tolling," Opp. 12, is not before the Court because the Federal Circuit did not address them. With all respect, that assertion is frivolous. The Federal Circuit did not *explicitly* address those issues for an obvious reason: It held, contrary to the rule in

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3. One other point raised by the government warrants a brief response. The government argues that the decision below will not prejudice fee applicants too greatly because "as long as an applicant timely alleges the basic jurisdictional prerequisites under EAJA," Opp. 11-12, the applicant will be granted "'some latitude to supplement his application to flesh out the missing details.'" Opp. 12 (quoting Pet. App. 8a). The "some latitude" standard is imprecise and does not apprise fee applicants of what is expected or provide guidance to the lower tribunals under the Federal Circuit's jurisdiction. Nor can one gain comfort from how the Federal Circuit has applied that standard to date, especially in light of the high volume of EAJA cases within the Federal Circuit's jurisdiction. *See* Pet. 5 & n.1, 16-17. That court has excused an EAJA applicant's failure to

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[2](...continued)
three other circuits, that EAJA's pleading requirements are "jurisdictional" and not subject to *any* exceptions, Pet. App. 5a-9a, which is precisely why it did not accept petitioner's amendment supplying the no-substantial-justification allegation. Pet. App. 10a. Thus, the Federal Circuit believed that it was without power to consider any reason provided by petitioner to excuse any alleged non-compliance with the 30-day deadline. Contrary to the implication in the government's opposition (at 12 n.6), petitioner raised equitable tolling and estoppel, as well as the equitable principles enunciated in *Dunn* and *Singleton*, in both his opening and reply briefs in the Federal Circuit. Brief for Appellant, at 5-10, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Sept. 29, 2000); Reply Brief for Appellant, at 3-5, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Jan. 24, 2001). Indeed, the government acknowledged petitioner's arguments on this score, and asserted that, regardless of the facts, petitioner's application was barred because the 30-day period imposed an absolute jurisdictional bar. Brief for Respondent-Appellee, at 7 n.4, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Jan. 9, 2001).

make any allegation about his eligibility for fees (net worth) on the ground that the net-worth allegation is "subsumed" by an applicant's statement that he was the prevailing party, *see Bazalo v. West*, 150 F.3d 1380, 1384 (Fed. Cir. 1998), even though the two concepts are unrelated. By contrast, the Federal Circuit affirmed the dismissal of petitioner's application, which similarly contained the prevailing-party allegation, on the ground that it did not include a no-substantial-justification allegation, even though the two concepts are intimately related to one another, since both concern how the government fared on the merits of the litigation. Thus, far from providing a reason to deny review, the government's embrace of the "some latitude" standard underscores the need for this Court to grant the petition and resolve the split in the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

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